APPEAL NO. 92152

On March 9, 1992, a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. He determined the appellant was not injured in the course and scope of his employment, did not have disability, did not notify his employer of any injury within 30 days and was, accordingly, not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., arts 8308-1.01 *et seq*. (Vernon Supp 1992) (1989 Act). Appellant seeks our review urging that he did suffer an on the job injury and that he did report his injury to his supervisor on the day it happened citing evidence he feels supports his position including assertions of his belief that his supervisor had changed time sheets. He also complains of possible violations of provisions of the 1989 Act; however, these matters are not germane to the issues decided at the contested case hearing and which are before us on the appeal.

DECISION

Finding the evidence sufficient to support the findings, conclusions and decision of the hearing officer, we affirm.

The appellant was employed by (Grocery) on Sunday, (date of injury) when he claims he was injured while he was loading groceries in a customer's van. He claims the van moved and he stepped on a smashed Coke can and fell in the van and injured his shoulder. He states he became "wheezy" and "dizzy headed" and "laid back down" on his back for about three to five minutes. No one witnessed this accident (it was not clear if the owner of the van, unknown at this time, saw the accident). In an interview conducted before the contested case hearing, the appellant stated he called the store manager, (GC), at home and told her about his injury the day it happened. At the hearing, he testified that the only person he told about the injury on the day it happened was the assistant store manager, (Ms. P), who was on duty. The appellant stated that the evening of the incident, he got nauseated and became ill. This, he opines, was a result of the virus that was making the rounds among the workers in the Grocery. He also began to experience symptoms from his injury. He went to a doctor on the 12th of June and obtained a work notice excusing him from work until "6-17-91" (Claimant's Exhibit 2) which he claims to have given to Ms. P. According to the appellant, the doctor told him he had a possible shoulder separation, lumbar strain and a virus (Exhibit 2 does not mention this). One medical report (Claimant Exhibit 7) indicates a reinjury to the shoulder on August 29 to which the appellant testified that he was getting out of an automobile when his wife slammed the door shut on him.

A report from the appellant's doctor dated October 8, 1991, states in pertinent part:

> This individual was seen in our office on June 12, 1991. He stated that on (date of injury), while on the job at (employer), he was loading groceries in a customer's car, he stepped on a can, causing him to fall and hurt his left shoulder. Examination revealed considerable tenderness over the acromioclavicular joint on the left. An x-ray taken showed an

> acromioclavicular joint separation. A sling was applied and medication was prescribed. Cervical spine x-rays showed no pathology other than muscle spasm. Physical therpy (sic) was prescribed.

The appellant testified that his wife was present at the Grocery at the time of his injury and although she did not see the appellant fall in the van she talked to him immediately afterward. He stated that he called his employer once a week for about four weeks to tell them he could not work. He testified that he is still disabled by his severe muscle pain, his inability to lift anything and his inability to sleep on his side. He stated that although he owns a variety of businesses operating under "D/B/As" (doing business as), none of them produce any income.

The appellant's wife testified that she was at the Grocery on the date of the injury and although she did not see the appellant fall, when he was gone for awhile she went to the van and found him there. They talked for about 10 to 15 minutes; however, the appellant's wife did not indicate they talked about the fall or any injury. She testified that when GC called the next week she told GC that the appellant had a virus and was on medication. She did not mention anything about an injury.

(Mr. S), owner of the Grocery, testified that the first he knew of any alleged injury was when the appellant left an insurance company form at the store a couple of weeks later. Because he did not understand what the appellant was referring to, Mr. S talked to the appellant on the phone a couple of days later. The appellant stated he hurt his shoulder and needed the forms for his auto insurance. The appellant told Mr. S "it didn't have anything to do with the store" and that he needed the forms filled out "so he could make a claim on his auto insurance." Some time later Mr. S got a registered letter from the appellant which involved "filing the forms for the workman's comp."

GC testified that the appellant called her on (date of injury), and told her he could not work because he had a virus. She identified time sheets admitted into evidence (Claimant's Exhibit 3) which had the notation that the appellant called in sick on the 9th of June (There was no evidence introduced to indicate the time sheets had been changed by anyone.). She stated the appellant never told her that he injured himself while at work and the first she realized there was any claim of a work related injury was when they "started getting the forms in from the workmen's comp" around August 25, 1991. GC testified that around the 28th of June she received a work notice from the appellant's doctor which showed a date of injury of (date of injury) and that she did not know what injury was being talked about because the appellant did not work on (date of injury).

The appellant was recalled as a witness and testified that the reason he had attempted to file a claim against his automobile insurance was because his father, an insurance agent, told him since the incident happened in a vehicle, he very likely could receive benefits from them. He explained that was why he was trying to get his employer to fill out the form he sent to the employer. He acknowledged that when he talked to Mr. S,

he told Mr. S that this had nothing to do with the store.

The Claimant has the burden of proving, by a preponderance of the evidence, that an injury occurred within the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). It goes without saying that the evidence and testimony in this case was in considerable conflict concerning an injury within the course and scope of employment as well as the matter of timely notice of any such injury. Clearly, it is the hearing officer, as the fact finder, who is in the best position to judge and assess the credibility of the witnesses and to determine the weight to be given the evidence. Article 8303-6.34(e); Texas Workers' Compensation Commission Appeal No. 92145 (Docket No. AM/92-012174-01-CC-LB41) decided May 27, 1992. A hearing officer's decision should not be set aside on review because a different inference and conclusion could be drawn from the evidence (Garza v. Commercial Insurance Company of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)) and we do not substitute our judgment for that of the hearing officer when, as here, his findings are supported by some probative evidence and are not against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ); Texas Workers' Compensation Commission Appeal No. 92122 (Docket No. WH/91-148810/01-CC-HO41) decided May 4, 1992. In his discussion section of his DECISION AND ORDER, the hearing officer noted that the credibility of the witnesses was the pivotal factor in deciding the case and stated he found the witnesses called by respondent to be totally believable and found the appellant's hearing testimony to be at variance with previously made statements. He also found more corroboration for the testimony of respondent's witnesses than for the testimony of the appellant. We do not find a sufficient basis to reject his evaluation of the evidence or his findings, conclusions and decision based upon that assessment. *See* Texas Workers' Compensation Commission Appeal No. 92130 (Docket No. FW/9117175-01-CC-FW41) decided May 21, 1992. Accordingly, the decision is AFFIRMED.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge